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No. 07-873

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IN THE

Supreme Court of the United States

ROBERTO DELGADO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals

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SUPPLEMENTAL BRIEF TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF CALLING ATTENTION TO A NEW ELEVENTH CIRCUIT CASE RELEVANT TO ISSUE THREE IN PETITION

Whether the trial court imposed a reasonable sentence upon Petitioner?

CITATION OF CASE BELOW

The opinion of the court of appeals is unreported, but may be found at *Delgado v. United States*, 2007 WL 2859806 (11th Cir. Oct. 3, 2007).

STYLE OF CASE

The Eleventh Circuit Court of Appeals rendered its decision on October 2, 2007. A petition for rehearing

was denied on November 7, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The petition seeking a writ of certiorari was filed on December 28, 2007, and the government filed its waiver of its right to file a response on January 8, 2008.

STATEMENT OF THE CASE

SETTING FORTH RELEVANT FACTS

Petitioner Robert Delgado is incarcerated on this case and is serving a thirty (30) year sentence. Mr. Delgado was convicted by a jury of count 1 possession of a firearm by a convicted felon (in violation of 18 U.S.C. §922(g)(1)); count 2 possession of cocaine with intent to distribute (in violation of 21 U.S.C. §841(a)(1)); and count 3 carrying a firearm during and in relation to a drug trafficking crime (in violation of 18 U.S.C. §924(c)(1)(A)(i)) (Doe 81- pg 1). The district court fashioned a prison term of 30 years by imposing 10 years for count 1 and 15 years tar count 2 and 5 years for count 3; all sentences to be served consecutively (Doe 90- pgs 1-3). The district court also refused to award Petitioner the reduction for acceptance of responsibility because Mr. Delgado exercised his constitutional right for a jury trial.

On January 14, 2008, the Eleventh Circuit Court of Appeals rendered an opinion in *United States v. Dorsey*, --F.3d--, 2008 WL 115428 (11th Cir. 2008) (attached), and addressed an issue of apparent first impression for the eleventh circuit. The defendants appealed their convictions and sentences for drug conspiracy and drug distribution charges after a jury trial. Mr. Dorsey's argument on appeal was that the government punished him for exercising his Sixth Amendment right to a jury trial by refusing to file a section 5K1.1 motion. A section 5K1.1 motion allows

for the district court to reduce the defendant's sentence based on the defendant's substantial assistance to law enforcement or other governmental entity. *See Dorsey*, 2008 WL 115428 at pg.2; *see also* USSG §5 K1.1.

The *Dorsey* court acknowledged that this Honorable Court has previously held that district courts may grant a remedy to defendants where the prosecutor's refusal to the a substantial assistance motion was based on an unconstitutional motive, such as race or religion. *See Dorsey*, 2008 WL 115428 at pg.2. The Eleventh Circuit specifically held that refusing to file a section 5K1.1 motion in retribution for exercising the Sixth Amendment right to trial by jury is an unconstitutional motive: "While the government may refuse to file a §5K1.1 for many reasons, and it is within the government's discretion to do so, 'to punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort'". *Id* (*quoting Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) and *citing Wade v. United States*, 504 U.S. 181, 185 (1992)).

In applying *Dorsey* to the instant case, Petitioner argues that the district court similarly violated his due process rights when it refused to grant him the acceptance of responsibility reduction because Petitioner exercises his right to a. trial by jury. In this case, Mr. Delgado went to trial to dispute the intent element of the cocaine possession (with intent to traffick), but not the actual possession of the cocaine itself, and to dispute the allegation that the firearm he possessed was possessed in furtherance of drug trafficking, but not the actual possession of the firearm itself (R3-97- 329).

In the instant case, the trial court refused to award the two point reduction, specifically because Mr. Delgado exercised his right to a trial by jury case (R1- 99- 48). The trial court noted that Mr. Delgado litigated the case "very carefully and properly" including a pretrial evidentiary hearing on its motion to suppress evidence, and therefore, should not be awarded an acceptance of responsibility reduction (R 99- 48, 49).

The district court violated Mr. Delgado's due process rights where it refused to acknowledge that Petitioner had accepted responsibility for his conduct, and most importantly, at trial, Mr. Delgado stipulated that he was a convicted felon (R3-97-313), did not dispute that he possessed the firearm (R3- 97-300), and did not dispute that he possessed the cocaine (R3-97322).

Respectfully submitted,

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January 22nd, 2008

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 06-16698
Non-Argument Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES DORSEY, a.k.a. Mountain Man,
SANDRA AVERY, a.k.a. Sandra Dorsey,
Defendants-Appellants.

Jan. 14, 2008

Before TJOFLAT, BIRCH and WILSON, *Circuit Judge.*

WILSON, *Circuit Judge*:

Upon *sua sponte* reconsideration of this appeal, we vacate our prior opinion and substitute the following in its place.

James Dorsey ("Dorsey") and Sandra Avery ("Avery") appeal their convictions for drug conspiracy and drug distribution charges after a jury trial. They both contend that pretrial motions to suppress evidence seized from their residence and introduced at their trial should have been granted because the affidavits supporting the search warrants contained false statements and lacked probable cause. After careful review, we find that there was sufficient corroborating information in the affidavits to support

a finding of probable cause, and affirm their convictions without further discussion.

Dorsey also appeals his sentence. He argues that the government refused to file a motion to reduce his sentence pursuant to United States Sentencing Guideline § 5K1.1 to punish him for exercising his Sixth Amendment right to a jury trial, thereby denying him due process of law. We have not previously considered whether the government's refusal to file a § 5K1.1 motion because the defendant exercised his right to a jury trial constitutes an unconstitutional motive. We now hold that it does, but we are unable to determine whether that is what took place in this case because of insufficient fact-finding at the district court. Therefore, we vacate Dorsey's sentence and remand this case for a new sentencing hearing.[1]

BACKGROUND

At sentencing, the district court determined that Dorsey's advisory Guidelines range was 168 to 210 months. Dorsey then moved the court to compel the government to file a motion pursuant to U.S.S.G § 5K1.1, because after his arrest he immediately cooperated with the police. After his arrest, Dorsey called his drug supplier, Steve Washington, and left a voice message and the return telephone number of a detective with the Sarasota Police Department on Washington's cellular phone. The next morning, the detective spoke to Washington and arranged to purchase a quarter kilogram of cocaine. When Washington arrived to deliver the cocaine, the authorities arrested him and seized the cocaine.

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[1] Dorsey also argues that his sentence was otherwise unreasonable. Since we vacate the sentence and remand for resentencing, we need not reach this claim.

Dorsey asserted that the government had earlier informed him that he could earn a § 5K1.1 departure because of his cooperation if he pled guilty. Once he decided to go to trial, the government did not file a § 5K1.1 motion. Dorsey argued that this constituted an impermissible exercise of the government's discretion in refusing to file a § 5K1.1 motion. The government responded that it had never told Dorsey that he had earned a § 5K1.1, departure; rather, he was told that the circumstances surrounding the minimal amount of cooperation that he provided would be considered if he cooperated fully and completely. At sentencing, the government stated that Dorsey "chose not to continue with cooperation. He chose to go to trial." Dorsey responded that irrespective of whether his cooperation was minimal or not, it was obvious that his cooperation was complete, and the government's refusal to move for a § 5K1.1 departure based on his decision to go to trial was an unconstitutional motive. Without explanation, the district court denied Dorsey's motion.

DISCUSSION

We review *de novo* whether the district cowl has the authority to depart downward from the guideline range under § 5K1.1 in the absence of a motion by the government. *See United States v. Forney*, 9 F.3d 1492, 1498 (11th Cir.1993).

Section § 5K1.1 of the Sentencing Guidelines provides that "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines." U.S.S.G. § 5K1.1. We have stated that the government has "'a power, not a duty, to file a motion when a defendant has substan-

tially assisted.'" *Forney*, 9 F.3d at 1500 (quoting *Wade v. United States*, 504 U.S. 181, 185, 112 S.Ct. 1840, 1843, 118 L.Ed.2d 524 (1992)). Therefore, a district court cannot grant a downward departure for substantial assistance absent a motion by the government. *Id.* at 1501. However, the United States Supreme Court held that "federal district courts have authority to review a prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive," like "race or religion." *Wade*, 504 U.S. at 185-86, 112 S.Ct. at 1843-44. A defendant who merely claims to have provided substantial assistance or who makes only generalized allegations of an improper motive is not entitled to a remedy or even to an evidentiary hearing. *Id.* at 186, 112 S.Ct. at 1844. Thus, judicial review is appropriate only "when there is an allegation and a substantial showing that the prosecution refused to file a substantial assistance motion because of a constitutionally impermissible motivation." *Forney*, 9 F.3d a 1502.

We have not previously decided whether the government's refusal to file a § 5K1.1 motion to punish a defendant for exercising his constitutional right to a jury trial is an unconstitutional motive under *Wade*, but the Third and Ninth Circuits have. They both held that refusing to file a § 5K1.1 to punish a defendant for exercising this right is an unconstitutional motive, and the Tenth Circuit has also said so, albeit in dicta. *United States v. Khoury*, 62 F.3d 1138, 1141 (9th Cir.1995); *United States v. Paramo*, 998 F.2d 1212, 1219-20 (3d Cir.1993); *United States v. Easter*, 981 F.2d 1549, 1555 (10th Cir.1992). While the government may refuse to file a § 5K1.1 for many reasons, and it is within the government's discretion

to do so, "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978). Accordingly, we agree with our sister circuits and hold that refusing to file a § 5K1.1 motion in retribution for exercising the Sixth Amendment right to a trial by jury is an unconstitutional motive under *Wade*.

The district court denied Dorsey's motion without explanation. Therefore, we cannot be certain that the district court believed that it had the authority to depart downward absent a motion by the government. Since we hold the district court has such authority, we vacate Dorsey's sentence and remand the case back to the district court to determine whether Dorsey can establish a "substantial showing" that the government's refusal to file a substantial assistance motion was based on an unconstitutional motive.

On remand, Dorsey has the burden of proving prosecutorial vindictiveness. We have found that "a superseding indictment adding new charges that increase the potential penalty would violate due process if the prosecutor obtained the new charges out of vindictiveness[, and] [v]indictiveness in this context means the desire to punish a person for exercising his rights." *United States v. Barner*, 441 F.3d 1310, 1315 (11th Cir.2006) (citation omitted). The same reasoning applies to a prosecutorial decision not to file a § 5K1.1 motion. *See Paramo*, 998 F.2d at 1220 (finding that the defendant must prove prosecutorial vindictiveness in a refusal to file a § 5K1.1 claim); *see also United States v. Murphy*, 65 F.3d 758, 762 (9th Cir.1995) (same).

A defendant may establish vindictiveness by either showing facts that give rise to a presumption of vindictiveness or by offering evidence of a prosecutor's actual vindictiveness. *Paramo*, 998 F.2d at 1220. A presumption of vindictiveness "may operate in the absence of any proof of an improper motiv[e;]" therefore, the presumption only applies when the factual circumstances indicate a "reasonable likelihood of vindictiveness." *United States v. Goodwin*, 457 U.S. 368, 373, 102 S.Ct. 2485, 2488, 73 L.Ed.2d 74 (1982). If a defendant successfully establishes a reasonable likelihood of vindictiveness, the government can overcome the presumption with objective evidence justifying its conduct. *See id.* at 374, 102 S.Ct. at 2489. In this case, the government stated that it did not file a § 5K1.1 motion because Dorsey's assistance was not substantial and that he started dealing drugs again. Therefore, even if a presumption of vindictiveness could apply in this case, the government has proffered legitimate reasons for its failure to file a § 5K1.1 motion. Therefore, Dorsey will have to prove actual vindictiveness. *See Paramo*, 998 F.2d at 1221. "This showing is, of course, exceedingly difficult to make, *United States v. Meyer*, 810 F.2d 1242, 1245 (D.C.Cir.1987). To prove actual vindictiveness, Dorsey must present objective evidence that the government acted solely to punish him for exercising his legal rights, and that the reasons proffered by the government are pretextual. *Id.; Paramo*, 998 F.2d at 1221.

We leave these issues to the district court to decide after further fact-finding at a new sentencing hearing.

AFFIRMED IN PART, VACATED AND REMANDED IN PART,